

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	Criminal Action No. 3:17-CR-170-CHB
)	
v.)	
)	ORDER ADOPTING MAGISTRATE
CLIFTON J. JONES, et al.,)	JUDGE’S REPORT AND
)	RECOMMENDATION
Defendants.)	

*** *** *** ***

This matter is before the Court on Magistrate Judge Colin Lindsay’s Report and Recommendation [R. 194], wherein he recommends that the Court deny the Defendants’ Motions to Suppress seeking to exclude evidence resulting from an October wiretap of Defendant Jones’ telephone [R. 109; R. 114]. The Motions to Suppress are equally applicable to all Defendants in this matter. On March 12, 2019 Defendants filed their joint objections to the Report and Recommendation. [R. 227] The Motion is now ripe for the Court’s review. This Court must make a *de novo* determination of those portions of the Report and Recommendation to which objections are made. 28 U.S.C. § 636(b)(1). Because the Magistrate Judge properly applied the framework for an evidentiary hearing pursuant to *Franks v. Delaware*, 438 U.S. 154 (1978), and also found the wiretap to meet the standards of 18 U.S.C. § 2510-2522, the Report and Recommendation will be accepted as the opinion of the Court.

In his Report and Recommendation Magistrate Judge Lindsay properly found that the Defendants satisfied the first half of the *Franks* test due to sufficient evidence of false or misleading statements regarding the use of confidential human sources. However, more is required than this as the Defendants must also show that the necessity requirement would not

have been met absent the challenged statements or omissions. *See United States v. Gonzalez*, No. 3:16-CR-082-DJH, 2017 WL 4875277, at *8 (W.D.Ky. Oct. 27, 2017). The Defendants make several objections as to why Magistrate Judge Lindsay erred in finding the necessity requirement met, each discussed in turn below.

First, the Defendants object that the investigation manufactured necessity by claiming a “purpose so wide that traditional techniques could never possibly achieve the goals of identifying” and prosecuting all members of the Sears and Jones organizations. [R. 227 at p. 9] However, the Sixth Circuit has upheld wiretaps that seek to “establish[] the scope of the conspiracy” even where there is already sufficient information against an individual defendant. *United States v. Jenkins*, 659 F. App’x 327, 335 (6th Cir. 2016). The Court finds nothing improper in the United States’ use of wiretaps to establish the bounds of the criminal conspiracy under investigation.

Next, Defendants object that Magistrate Judge Lindsay failed to place sufficient weight on the absence of the use of confidential informants. The Court finds this objection to be somewhat paradoxical. As noted by Magistrate Judge Lindsay, because he found the special agent’s affidavit misleading as regards to the use of confidential human sources, the *Franks* test requires him to set aside those false statements when determining whether necessity was nevertheless met. [R. 194 at p. 14 n. 6] Leaving that aside, the lack of use of confidential human sources would not be fatal to a finding of necessity as “the government is not required to prove that every other conceivable method has been tried and failed or that all avenues of investigation have been exhausted.” *United States v. Alfano*, 838 F.2d 158, 163 (6th Cir. 1988). Rather, investigators must only show that they “gave serious consideration to the non-wiretap techniques prior to applying for wiretap authority and that the court be informed of the reasons for the

investigators' belief that such non-wiretap techniques have been or will likely be inadequate." *Id.* at 163-64.

The Defendants next object that Magistrate Judge Lindsay failed to find additional paragraphs misleading, namely those relating to the use of confidential human sources, the success of the non-wiretap investigatory methods, and the use of a grand jury, search warrants, and arrest warrants. [R. 227 at p. 11] As already explained above, it was proper under the *Franks* framework for Magistrate Judge Lindsay to exclude consideration of confidential human sources from his Report and Recommendation. Next, the Court finds no falsity in the special agent's claim that other techniques had been tried but failed, as the affidavit makes clear that while the non-wiretap techniques had produced some results, they had reached the end of their usefulness and therefore necessitated a wiretap. Simply because "some investigative techniques were successful in uncovering evidence of wrongdoing does not mandate that a court negate the need for wiretap surveillance." *United States v. Stewart*, 306 F.3d 295, 305 (6th Cir. 2002).

Defendants also argue that the special agent made a false statement when he stated that use of a grand jury, search warrants, and arrest warrants would not be available for fear of alerting the Jones organization to the on-going investigation. Defendants argue that because extensive use was allegedly being made of confidential human sources (with their own risk of alerting the Jones organization to the investigation), any similar fear regarding the use of a grand jury or various warrants must be false. First, the Court does not agree that concern with the availability of one method of investigation necessarily forecloses the use of somewhat related investigatory methods or even shows falsehood. Simply because confidential human sources were deemed useful in certain circumstances does not mean that, for example, an arrest warrant of a member of the organization must necessarily also be useful. This is especially true when

one considers the material difference between the two investigatory methods: a confidential informant is by its very nature confidential, while arrest and search warrants are an open action taken against a criminal organization. However, even if one were to make this logical jump, Magistrate Judge Lindsay properly found that the affidavit gave sufficient reasons for why these specific methods either had or would fail to provide meaningful insight in the investigation at hand.

Next, the Court finds that Magistrate Judge Lindsay properly distinguished the present case from *United States v. Rice*, No. 3:04-CR-083-TBR (W.D.Ky. Oct. 10, 2005). Unlike in *Rice*, where Judge Russell found that the government had improperly used a wiretap as the initial step in its investigation, the affidavit at issue in the present case makes clear the various traditional investigatory methods that were used before resorting to a wiretap, including several investigative techniques not used in *Rice*, such as: location data on Jones' phone, record and property searches based on the location data they received, and a Facebook search to obtain a photograph of Jones. [R. 194 at p. 14] Further, while in both cases the inadequacy of physical surveillance was used as a basis for necessity, the nature of the surveillance in the present case stands in stark contrast to that described in *Rice*. While in *Rice* it was shown that "Mr. Rice himself was never under surveillance," *Rice*, [R. 303] at p. 23, the instant affidavit lays out a successful surveillance operation of Defendant Jones as well as an explanation as to why any further surveillance would be unsuccessful. [R. 194 at p. 14] Specifically, the affidavit notes that during one attempt at physical surveillance the officers were only able to maintain their positions for a short period of time before gaining the attention of suspected lookouts and needing to relocate. *Id.* at 17 These numerous differences in the two investigations lead the Court to conclude that Magistrate Judge Lindsay properly distinguished the two cases.

Next Defendants object that only twenty days passed between the investigation's discovery of Defendant Jones as a potential source of narcotics and the application for a wiretap of his phone. [R. 227 at p. 24] While certainly a short period of time, this alone is not fatal to a finding of necessity. *Gonzalez*, 2017 WL 4875277, at *8 (finding that a thirteen day investigation did not defeat a finding of necessity). Rather than any particular time frame, what is required is that investigators "gave serious consideration to the non-wiretap techniques prior to applying for wiretap authority and that the court be informed of the reasons for the investigators' belief that such non-wiretap techniques have been or will likely be inadequate." *Alfano*, 838 F.2d at 163-64. Because the Court finds that various traditional investigatory methods were either tried or if not, seriously considered, the short length of time alone does not defeat the finding of necessity.

Finally, Defendants object that the special agent's affidavit improperly relies on overly generalized statements which are conclusory and applicable to all narcotics investigations. Yet an affidavit is not insufficient simply because it rests in part on statements that could be applicable to any investigation. *United States v. Landmesser*, 553 F.2d 17, 20 (6th Cir. 1977). What is important is that the affidavit does not rest solely on such statements. As correctly noted in the Report and Recommendation, the affidavit contains a multitude of statements that are specifically related to the investigation at hand and the difficulties encountered with their use. Many of these methods have already been discussed in detail above, however, as Defendants broadly object that "many of the paragraphs in the October 10, 2017 wiretap application contained purely conclusory statements," the remaining investigatory methods bear some mention. [R. 227 at p. 27]

The special agent concluded that undercover agents would not be a useful method due to Jones' criminal history which included violent crimes and the fact that certain members of the

Sears organization were drug users. According to the affidavit these two factors could potentially subject the undercover agents to violent or unpredictable behavior, therefore making their use a poor alternative to a wiretap. Further, the affidavit indicates that the special agent had conducted a financial investigation into the members of the criminal organization, but noted that it only identified minimal financial assets. This fact, along with his experience that drug traffickers often use cash or fictitious bank accounts to hide their proceeds, led him to believe that further financial investigation would not yield any useful information. The Court finds no error in the affidavit bolstering its investigation-specific conclusions with more general observations based upon law enforcement experience.

Ultimately, the Court is satisfied that the concerns motivating the necessity requirement of 18 U.S.C. § 2518(c) have been met. The statute's purpose is not to "foreclose electronic surveillance until every other imaginable method of investigation has been unsuccessfully attempted, but simply to inform the issuing judge of the difficulties involved in the use of conventional techniques." *Landmesser*, 553 F.2d at 20 (internal citation omitted). The statute mandates that a wiretap not be the first step of an investigation, not that it be used only as a last resort. *Id.* The Court is satisfied that Magistrate Judge Lindsay's Report and Recommendation properly polices this line.

IT IS HEREBY ORDERED as follows:

1. The Report and Recommendation [**R. 194**] is **ADOPTED** and is entered as the findings and conclusions of the Court.
2. Defendants' Objections to the Magistrate Judge's Report and Recommendation [**R. 227**] are **OVERRULED**.
3. The Defendants' Motions to Suppress [**R. 109; R. 114**] are **DENIED**.

April 12, 2019

Clara Horn Boom

Clara Boom, District Judge
United States District Court

cc: Counsel of record